IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-7662

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Hicks v. Oklahoma prohibit a state from arbitrarily depriving an individual of the state-created entitlement to unanimous jury findings on aggravating circumstances before a sentence of death is imposed?
2. Under Harris v. Reed, is it permissible for a federal court to analyze state law and the state court record to determine whether federal claims are barred by state procedural default?
3. Should a federal court waive a procedural default resulting from post-conviction counsel's failure to file a timely appeal when the default would bar any hearing of the petitioner's constitutional claims?
4. Does the deliberate bypass standard of Fay v. Noia continue to apply to a procedural default resulting from a failure to appeal at all?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit dismissing petitioner's federal petition for a writ of habeas corpus, reported at 895 F.2d 139 (4th Cir. January 31, 1990), and the order of the Court of Appeals dismissing the petition for rehearing and rehearing en banc, reported at 1990 U.S. App. Lexis 3189 (4th Cir. February 27, 1990), are reproduced in the Appendix at a7 to a23. The opinion of the United States District Court for the Western District of Virginia, issued on December 6, 1988, is also reproduced in the Appendix at a24 to a40.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the denial of Petitioner's habeas corpus application under 28 U.S.C. § 2254 was entered on January 31, 1990. The Court of Appeals denied the petition for rehearing and rehearing en bance on February 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions are the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Also relevant are the Code of Virginia §§ 17-110, 19.264-2 - 19.264-4, reproduced in the Appendix at a1 to a6.

STATEMENT OF THE CASE

The Trial: On March 18, 1982, petitioner Roger Keith Coleman was convicted in the Circuit Court for Buchanan County, Virginia, for the rape and murder of his sister-in-law, Wanda Fay McCoy. The next day, the jury fixed his sentence as death.

Coleman has consistently maintained his innocence. At trial, Coleman denied committing the crime and testified in support of his alibi for the night of the

crime. His testimony demonstrated that he could not have committed the crime. Several witnesses, including Phillip Van Dyke, corroborated Coleman's testimony. Physical evidence, in the form of Van Dyke's time card from work, could have supported Van Dyke's testimony, but the prosecution did not produce the card to Coleman's counsel. Evidence also showed that no coal dust was found on the victim or in her home, despite the fact that the clothes Coleman wore on the evening of the crime were permeated with coal dust.

After presenting extensive testimony relating to the condition of the victim's body, the prosecution introduced evidence that the blood type of the assailant and that of Coleman was "B," and that hairs found on the victim were "consistent" with hair samples taken from Coleman. To demonstrate that Mrs. McCoy knew her assailant, the Commonwealth presented evidence that there were no signs of forced entry at the McCoy house. However, police investigative reports, which were not produced to Coleman's counsel and consequently were never revealed to the jury, indicated that there was a pry mark on the front door. The prosecution introduced the testimony of Sandra and Gary Stiltner concerning Coleman's whereabouts on the night of the crime to contradict Coleman's and Van Dyke's

testimony, but it withheld from Coleman copies of the Stiltners' pre-trial statements. Those statements, as well as the Van Dyke time card, could have helped Coleman demonstrate to the jury that it should have believed his alibi.

Last, the prosecution introduced the testimony of Roger Matney who testified that Coleman had made a "jailhouse confession" while in jail awaiting trial. Matney's trial testimony contradicted his pre-trial statement, but Coleman's counsel, who had failed to interview Matney before trial, failed to impeach him.

Before trial, Coleman's court-appointed attorneys -- neither of whom had ever defended a murder suspect or conducted a jury trial in a serious criminal case -- interviewed some, but not all, of the police officers who investigated the crime. Coleman's counsel failed to interview Elmer Gist, the state forensic expert, who testified to the relationship between the physical evidence and Coleman, and they failed to find or consult a forensic expert for the defense. Counsel failed to time the route the prosecution claimed Coleman took that night and never sought out other witnesses who could have supported his alibi. They also made no effort to gather any of the evi-

dence of community prejudice indicating that Coleman would not receive a fair trial in Grundy, Virginia.

The jury returned a verdict of guilty at 10:50 p.m. on March 18, 1982. The trial court set the penalty phase of the trial for 9:15 the next morning. Coleman's attorneys never asked him for any help in collecting mitigating evidence for the sentencing phase until after the guilt phase had been concluded, and had not even told Coleman about the penalty phase of a capital case until after the trial had begun. Not surprisingly, Coleman was not able to help immediately after being convicted, and his counsel's presentation at sentencing was weak and unconvincing. The instruction and verdict form given to the jury did not guarantee that the jury would find unanimously either of the statutory aggravating circumstances, as is required by Virginia law. The jury fixed Coleman's punishment at death.

Direct Appeal: Coleman's trial counsel represented him on appeal. The Supreme Court of Virginia affirmed the conviction and sentence of death on September 4, 1983. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983). New counsel prepared and filed on Coleman's behalf a petition for a writ of certiorari to

the United States Supreme Court. The petition was denied on March 19, 1984. 465 U.S. 1109 (1984).

State Habeas Corpus: Coleman filed a petition for a writ of habeas corpus in the Circuit Court of Buchanan County on April 26, 1984, and amended that petition on September 7, 1984. Circuit Judge Glyn Phillips held an evidentiary hearing on November 12 and 13, 1985. At the hearing, Coleman introduced evidence that one of the jurors who sentenced him to death had stated before trial that he wanted to sit on the jury so he could "help burn the S.O.B." Coleman also introduced evidence to demonstrate that he had not received effective representation from his trial counsel at any stage in the proceedings. The factors indicating ineffective representation included the failure to introduce evidence of community prejudice at the venue hearing, to seek out and introduce alibi evidence, to cross-examine effectively the state forensic expert, and to prepare for the penalty phase.

Judge Phillips issued a letter opinion dated June 23, 1986, which stated that he intended to deny Coleman's petition. In denying Coleman's juror bias claim, Judge Phillips never determined whether the juror had stated that he wanted to be on the jury to help execute Coleman. The letter opinion requested that the

Commonwealth prepare a final order denying the petition. On September 4, 1986, Judge Phillips signed the final order exactly as presented by the Commonwealth, even though it included findings not in his letter opinion, and mailed the order to the Clerk of the Buchanan County Court. The Clerk entered the order into the docket book on September 9, 1986, and mailed copies to Coleman's counsel.

State Habeas Corpus Appeal: On October 6, 1986, Coleman filed his notice of appeal to the Virginia Supreme Court. The Commonwealth moved to dismiss the appeal as untimely because the notice had been filed thirty-one days after the date the judge signed the order. Coleman was not on notice that the judge had signed the order until the Clerk had reviewed and entered the order and advised the parties of that entry. In a one paragraph order that listed all the briefs filed before it, the Virginia Supreme Court dismissed the appeal.[1] The order did not state the basis for the dismissal. Coleman's motion for rehearing before the Virginia Supreme Court was denied on June 12, 1987. The United States Supreme Court denied

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1. A copy of the Order is reproduced in the Appendix at a41.

Coleman's petition for certiorari on October 19, 1987. Coleman v. Bass, 484 U.S. 918 (1987).

Federal Habeas Corpus: On April 22, 1988, Coleman filed this federal petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia. The Commonwealth moved to dismiss, claiming that relief was barred on procedural grounds because the Virginia Supreme Court had dismissed Coleman's habeas appeal and that the petition was without merit. Coleman contested the procedural default because, among other things, the Virginia Supreme Court's ruling did not clearly rely upon state law grounds. In addition to demonstrating that his claim had merit, Coleman cross-moved for an evidentiary hearing because the state habeas court had never ruled on certain factual issues critical to its legal conclusions.

In an Opinion and Order dated December 6, 1988, Judge Williams granted respondent's motion to dismiss the petition. Judge Williams found that Coleman's filing of the appeal one day late resulted in a procedural default of his state habeas claims and that Coleman's petition was not meritorious. The District Court also denied Coleman's motion for an evidentiary hearing.

Federal Habeas Corpus Appeal: On January 3, 1989, Coleman filed his notice of appeal from that decision. A Certificate of Probable Cause to Appeal was issued by the District Court on January 4, 1989. The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on January 31, 1990. The Court of Appeals relied primarily on its view that the late-filed appeal was the basis for the Virginia Supreme Court's dismissal such that all Coleman's claims raised in the state habeas proceedings were defaulted. The Court of Appeals discussed the merits only of Coleman's capital sentencing claim. Coleman's petition for rehearing and suggestion for rehearing en banc were denied on February 27, 1990.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI IS NECESSARY TO DEFINE THE PARAMETERS OF THE DUE PROCESS RIGHT ESTABLISHED IN *HICKS v. OKLAHOMA.*

Coleman was denied liberty without due process of law because the sentencing jury did not find unanimously, as is required by Virginia law, at least one aggravating circumstance. See Hicks v. Oklahoma, 447 U.S. 343 (1980) (federal due process requires that state law right to have particular findings made by the sentencer cannot

be denied arbitrarily); Presnell v. Georgia, 439 U.S. 14 (1978) (striking down death sentence as violative of due process when state supreme court made prerequisite finding that jury should have made). Certiorari is necessary because the Fourth Circuit's application of Cabana v. Bullock, 474 U.S. 376 (1986), to Coleman's case has cast doubt on whether the Hicks right extends beyond the precise factual situation of Hicks. Moreover, this Court's discussion of the Hicks right in Clemons v. Mississippi, 110 S. Ct. 1441 (1990), needs clarification in order to insure that federal due process continues to protect liberty interests stemming from a state right to particular jury findings prior to the imposition of sentence.

A. Coleman Was Denied His State Law Right To Juror Unanimity As To The Aggravating Circumstances.

Virginia law permits a sentence of death only when the jury finds unanimously at least one of the two statutory aggravating circumstances of "vileness" and "future dangerousness."[2] Va. Code § 19.2-264.4C; see

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2. Pursuant to the Virginia capital sentencing scheme the "sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant find that there is a probability that the defen- (continued...)

(Linwood E.) Briley v. Bass, 742 F.2d 155, 165-66 (4th Cir.) (discussing need for unanimous finding on at least one aggravating circumstance), cert. denied, 469 U.S. 893 (1984); (James D.) Briley v. Bass, 750 F.2d 1238, 1241 (4th Cir. 1984) ("Virginia law requires that the jury . . . find either of two specific aggravating circumstances proven beyond a reasonable doubt before the death penalty can be imposed."), cert. denied, 470 U.S. 1088 (1985). The instruction and verdict form used in Coleman's case arbitrarily denied him that right because the two aggravating circumstances were separated by the disjunctive "or".[3] As a result, the sentencing jury was

2.(...continued)
dant would commit criminal acts of violence that would constitute a continuing threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed." Va. Code § 19.2-264.2.

3. The verdict form used in Coleman's case read as follows: "We, the Jury, on the issue joined, having found the Defendant Guilty of feloniously killing and murdering Wanda Thompson McCoy during the commission of rape and that (after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the
(continued...)

instructed that unanimity was required only for the ultimate verdict and not for the aggravating circumstances individually: the Coleman jury therefore may have fixed the sentence as death even if only six jurors found the "vileness" aggravating circumstance applied to Coleman while the other six found that the "future dangerousness" circumstances applied to Coleman.

In affirming the sentence, the Virginia Supreme Court erroneously interpreted the instruction and verdict form as meaning that all twelve jurors had found both aggravating circumstances. Coleman v. Commonwealth, 307 S.E.2d 864, 876 (1983), cert. denied, 465 U.S. 1109 (1984). Coleman's case was not like other Virginia cases in which juror unanimity as to both aggravating circumstances was insured through either juror polling or physical alteration of the verdict form. See (Linwood E.) Briley v. Bass, 742 F.2d at 166; (James D.) Briley v. Bass, 750 F.2d at 1246; Frye v. Commissioner, 231 Va. 370, 345 S.E.2d 267, 284 (1986). Because there is a "reasonable likelihood" that the Coleman jury interpreted the instruction as not requiring unanimity on the aggravating circumstances, the Virginia Supreme Court should have

3.(...continued)
evidence in mitigation of the offense, unanimously fix his punishment at death."

assumed that the jury interpreted the instruction as if it did not guarantee unanimity. See Boyde v. California, 110 S. Ct. 1190, 1198 (1990); Mills v. Maryland, 486 U.S. 367 (1988).[4] In the absence of such unanimity, Coleman was denied a state law entitlement to a jury finding on the aggravating circumstances.

B. The Court Should Grant Certiorari To Insure That The Due Process Right Recognized By *Hicks* Applies To All Jury Findings Required For Imposition Of Sentence.

As described in Hicks, a defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." 447 U.S. at 346. Arbitrary denial of that expectation violates due process. Id. Coleman's case requires determination of the applicability of the Hicks right concerning the range of sentencing options available to state-mandated findings that are a prerequisite to the

4. The line of cases on interpretation of jury instructions primarily concerns the question of whether a challenged instruction "prevents the consideration of constitutionally relevant evidence." See Boyde, 110 S. Ct. at 1198. The proposition that a sentence should be overturned when there is a reasonable likelihood that a jury misinterpreted an instruction should apply with equal force to insure that a jury does not impose a sentence of death after misapprehending the state law prerequisites to imposition of that sentence.

sentencing determination. In Coleman's case the jurors understood that they had the discretion to sentence him either to death or to a prison term, but they did not understand that before they could exercise their discretion to impose a sentence of death, they were required to find unanimously at least one of the two aggravating circumstances. The failure to instruct a jury properly on what findings must be made in determining the range of sentencing options is equivalent to a failure to instruct the jury properly on those options. If the jury does not properly comprehend the necessary prerequisite findings, then it will not understand the range of sentencing options available. Therefore, the failure to insure that the jury understood the nature of the finding required before it could consider sentencing Coleman to death denied him liberty without due process of law.

The Fourth Circuit denied this due process claim because it believed that Coleman had no Sixth or Eighth Amendment right to any particular jury findings in the imposition of a sentence of death. Appendix at a19-20, 895 F.2d at 146-47. It relied on Cabana v. Bullock, 474 U.S. at 389, to justify its holding that there are no circumstances under which the Constitution requires jury

findings prior to the imposition of the death sentence. Id. at a20, 895 F.2d at 147. The Fourth Circuit's ruling failed to take into account the federal due process requirement recognized in Hicks and elaborated in Bullock. If the Fourth Circuit's interpretation of Bullock is allowed to stand, then the Hicks right will be limited solely to the specific issue of whether the sentencer was adequately informed of the range of available sentencing options. All other findings that a state requires prior to the final sentencing determination could be arbitrarily denied to a particular defendant.

The Court's discussion of Hicks in other cases -- including Bullock -- indicates that the Court did not intend for Hicks to have such narrow applicability. In Bullock, the Court recognized that the Hicks right applies to jury findings other than the ultimate imposition of a sentence. Although the Court denied the Hicks claim, its discussion indicates that the Hicks right applies to jury findings other than the final sentencing determination:

> In Hicks we held only that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement. Unlike the defendant in Hicks, Bullock had no state-law entitlement at the time of his trial to have the jury (or, indeed, anyone at all) make the Enmund findings. Of course,

> federal law, as later established by Enmund does entitle Bullock to a determination whether he killed, attempted to kill, intended to kill, or intended that lethal force be used; but . . . the federal-law entitlement, unlike the state-law entitlement involved in Hicks, does not specify who must make the findings.

Bullock, 474 U.S. at 387 n.4.[5]

In Clemons v. Mississippi, 110 S. Ct. 1441, 1447 (1990), the Court recognized the applicability of Hicks to other jury findings: "[W]e have recognized that when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes." After stating that there was no Sixth or Eighth Amendment right to have a jury determine the appropriateness of a sentence, the Court considered whether Clemons nonetheless had been denied his federal due process rights because he did not receive that to which he was entitled under state law. Id.

In Clemons, the Court considered whether the Hicks due process right was violated when an appellate

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5. The finding at issue in Bullock was the federally-mandated finding required by Enmund v. Florida, 458 U.S. 782 (1982). As Bullock made clear, each state was free to choose the procedure for satisfying that federal requirement. At issue in Coleman's case is the ability of a state to deny to one defendant a state-created liberty interest in specific jury findings prior to the imposition of sentence.

court reweighed the aggravating and mitigating circumstances after one of the aggravating circumstances considered by the jury was held to be invalid. The Court held there was no constitutional violation only because the Court believed that Mississippi state law provided for appellate courts to perform the reweighing, and not because Hicks did not apply to jury findings prior to the imposition of sentence. Id. The Court noted that the Mississippi court, unlike the Oklahoma court in Hicks, asserted that it had the authority to decide whether the sentence could be affirmed. Id. If state law did not allow appellate courts to engage in the reweighing, then due process would have been violated. See id. at 1448.[6]

Nothing in either Virginia statutory or decisional law allows appellate courts to find that an aggravating circumstance exists when the jury has failed to make such a finding. Here, the Virginia Supreme Court never attempted to find whether the aggravating circumstances existed, nor did it contend that state law provided for such an appellate finding. Its opinion simply assumed, based upon the supposed jury findings, that both

6. In Clemons the Court remanded the case because it was unclear whether or not the Mississippi Supreme Court actually reweighed the aggravating and mitigating circumstances. Clemons, 110 S. Ct. at 1451.

aggravating factors existed. Coleman, 307 S.E.2d at 876.[7] The Virginia Court did not make its own determination that either aggravating factor existed, no doubt because Virginia law provides that the trial jury is obligated to find those facts.

The Fourth Circuit's citation to the Virginia Supreme Court's statement that it had "independently determined" that the sentence of death was appropriate, Coleman, Appendix at a21, 895 F.2d at 147, fails to recognize that the determination related only to those findings that Virginia law requires its Supreme Court to make in every capital case. See Va. Code § 17-110. Review under that provision is limited to three items: (1) consideration of enumerated errors on appeal; (2) consideration of the proportionality of the sentence; and

7. Coleman's trial counsel was ineffective for both its failure to object to the sentencing instructions and its failure to appeal their use. This ineffectiveness constitutes cause for waiving any procedural default resulting from the failure to object. See Murray v. Carrier, 477 U.S. 478 (1986). Had Coleman's counsel done basic research into Virginia capital sentencing law, they would have known that the issue of unanimity of the jury on aggravating circumstances was an issue about which the Virginia Supreme Court had expressed concern. See Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643, 656 (Poff, J., concurring in part, dissenting in part) (stating that use of "or" between aggravating circumstances rendered verdict ambiguous and violated Virginia law), cert. denied, 460 U.S. 1029 (1983).

(3) consideration as to whether the sentence is arbitrarily imposed. Nothing in § 17-110 authorizes the Virginia Supreme Court to find the aggravating circumstances when the jury has failed to find one unanimously, and the Virginia Supreme Court decision does not purport to do so. In no case has the Virginia Supreme Court made an independent determination -- as opposed to affirming a jury determination -- that one of the aggravating circumstances existed.

Certiorari is necessary to ensure that general review by a state supreme court is not used to evade a defendant's due process entitlement to particular jury findings prior to the imposition of a sentence of death. Under the Fourth Circuit's view, there can never be a Hicks violation once a state supreme court undertakes some general review of the sentence. This Court should grant certiorari to reverse that ruling and make clear that Hicks protects more than the ultimate determination of sentence; instead, Hicks stands for the proposition that due process is denied whenever a finding required to be made by a sentencing jury is not made by that jury.

II.

THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE PROPER CONSTRUCTION OF *HARRIS V. REED'S* PLAIN STATEMENT RULE.

In Harris v. Reed this Court held that federal habeas review of federal constitutional claims is barred by procedural default only where the last state court rendering a judgment in the case "clearly and expressly" relied on procedural default as an independent basis for denying relief. 109 S. Ct. 1038, 1042-45 (1989). The Court explained that the mere fact that a petitioner violated a state procedural rule does not bar federal review of his claims. Rather, "'the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" 109 S. Ct. at 1042 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)). Harris made clear that the plain statement requirement applied even to summary orders: "a state court that wishes to rely on a procedural bar rule in a one-line pro forma order easily can write that 'relief is denied for reasons of procedural default.'" Id. at 1044 n.12.

The Court reasoned that to hold otherwise would force federal habeas courts "to examine the state court record to determine whether procedural default was argued to the state court" or to analyze state law to determine

whether a procedural bar was applicable to a particular case. Id. at 1044. And because state courts sometimes forgive procedural defaults, federal courts would have to determine not only whether there had been a procedural default but also whether the state had chosen to forgive the default. Id. at 1044 n.11.

Harris v. Reed rejected such federal second-guessing regarding state court proceedings. In so doing, it rejected the rule of most circuits that ambiguous state decisions would be treated as procedural bars if the federal court determined that a procedural default had occurred. See, e.g., Rodriguez v. Scully, 788 F.2d 62 (2d Cir. 1986) (presumption that affirmance without opinion was on procedural grounds); Tweety v. Mitchell, 682 F.2d 461 (4th Cir. 1982) (declining to assume Virginia Supreme Court's dismissal without opinion of habeas petition was on merits), cert. denied, 460 U.S. 1013 (1983); Bates v. Blackburn, 805 F.2d 569 (5th Cir. 1986) (where state court silent as to whether relief denied on procedural grounds federal court would consider (1) state's prior use of procedural default in similar circumstances; (2) history of the case; (3) whether silence suggests reliance on procedural default or review of merits), cert. denied, 482 U.S. 916 (1987).

Most circuits now construe any ambiguity as a decision on the merits. But some, clinging to their old rules, have interpreted Harris v. Reed to allow them to consider state procedural law and the record below in an attempt to decide for themselves whether a claim was procedurally defaulted. The Court should grant certiorari to stop that trend.

A. The Circuits Are Split As To Whether *Harris v. Reed* Permits Federal Courts To Consider Extrinsic Evidence To Determine Whether A Federal Claim Is Barred By State Procedural Default.

The Fourth Circuit's decision in this case marks it as one of three circuits (the Fourth, Fifth and Eleventh) that do not consider Harris v. Reed to have constrained their ability to analyze state law and the lower court record in support of their efforts to find federal claims barred by procedural default. The Virginia Supreme Court's decision dismissing Coleman's habeas appeal listed all the briefs and motions filed with regard to Coleman's appeal. It then concluded that "[u]pon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." Nothing in the order specified that the dismissal was granted on procedural default grounds; it might well have been granted because the court

found the petition to be without substantive merit. See Appendix at a41.

The Fourth Circuit's conclusion that Coleman's claims are barred by procedural default does not purport to be based exclusively on the Virginia Supreme Court's decision. Rather, the Fourth Circuit went beyond the face of the state court opinion and considered extrinsic evidence to conclude that the Virginia Supreme Court's decision was based on procedural grounds. The Fourth Circuit noted that the Commonwealth had based its motion to dismiss upon Virginia Supreme Court Rule 5:9(a) and assumed that this was the basis for the Virginia court's ruling. This assumption was apparently based on the Fourth Circuit's view that Rule 5:9(a) is mandatory and that the Virginia court must have followed it. See Appendix at a11-12, 895 F.2d. at 143. Yet the Virginia Supreme Court's order mentions neither Virginia Supreme Court Rule 5:9(a) nor procedural default. See Appendix at a41. By looking beyond the order to both the state record and Virginia law, the Fourth Circuit developed a rule of construction that cannot be reconciled with Harris v. Reed.[8]

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8. In addition to being contrary to the rule of Harris v. Reed, the Fourth Circuit's conclusion about state (continued...)

Like the Fourth Circuit, the Fifth and Eleventh Circuits have construed Harris to allow federal courts to go beyond the four corners of the last state court judgment by considering extrinsic facts from the state court record or analyzing state procedure to determine whether the state claim was defaulted. See, e.g., Ellis v. Lynaugh, 873 F.2d 830 (5th Cir.), cert. denied, 110 S. Ct. 419 (1989); Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989); Harmon v. Barton, 894 F.2d 1268 (11th Cir. 1990).

In Harmon v. Barton, for example, the Eleventh Circuit found a petitioner's federal claims barred by pro-

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8.(...continued)
law may well have been wrong. The parties had briefed both procedural default and the merits of Coleman's claims, and the Virginia Supreme Court's summary order listed all briefs and dismissed the petition "[u]pon consideration whereof." On at least one occasion, the Virginia Supreme Court has looked at the merits in deciding whether to hear a late-filed appeal. See O'Brien v. Socony Mobil Oil Co., 207 Va. 707, 152 S.E.2d 278 (late appeal not allowed because plaintiff had not been denied any constitutional right), cert. denied, 389 U.S. 825 (1967). Moreover, the Virginia Supreme Court knows how to state clearly and expressly that a decision is based on state law. See, e.g., Dodson v. Director of Corrections, 233 Va. 303, 355 S.E.2d 573, 574 (1987) (quoting order dismissing petition for appeal because "the appeal was not perfected in the manner provided by law. . . . Rule 5:14(a)"). Harris's point is precisely that because federal courts are not equipped to be arbiters of state law, they should nct intrude into the province of state courts by analyzing state law to decide whether a default has occurred. If the state court decision is based on procedural default, it must say so expressly.

cedural default where the last state court to render judgment affirmed without comment a lower court's denial of post-conviction relief.[9] The Eleventh Circuit engaged in an extensive analysis of Florida law, noting that unwritten per curiam affirmances have res judicata but no other precedential value and that the state's streamlined procedure for summary denials of post-conviction relief allows the "clear inference" that the appeals court accepted "not only the judgment but the reasoning of the trial court." 894 F.2d at 1273.[10] The Eleventh Circuit concluded that

9. In direct conflict, several courts have held that affirmances or denials of relief without comment cannot constitute "clear and express" reliance on state procedural grounds. See Nunnemaker v. Ylst, 896 F.2d 1200 (9th Cir. 1990); Coston v. Zimmerman, 725 F. Supp. 846, 849 (E.D. Pa. 1989) (prisoner's "late filing of his petition for allocatur cannot be taken as a procedural default because the Pennsylvania Supreme Court's order merely said it was denied"); Maxwell v. Smith, 722 F. Supp. 7, 8 (W.D.N.Y. 1989) ("It is not possible to hold that an affirmance without opinion clearly and expressly states a court's reliance on a state procedural default."); see also Peterson v. Scully, 896 F.2d 661, 664 (2d Cir. 1990) (Harris "instructs the federal courts on how to interpret ambiguity or silence in state court opinions in habeas corpus cases.").

10. Like the Fourth Circuit in Coleman's case, the Eleventh Circuit may well have misinterpreted state law. The court's analysis rested in part on Fla. R. App. P. 9.140(g), which requires that denials of post conviction relief be reversed and remanded "[u]nless the record shows conclusively that the appellant is entitled to no relief." Harmon, 894 F.2d at 1273. The (continued...)

it would not apply Harris's clear statement requirement to the last state court judgment but would instead look behind the face of that judgment "to the last state court that rendered judgment and provided reasons for the judgment." Id.

The Fifth Circuit has similarly misapprehended Harris's plain statement rule. In Ellis v. Lynaugh, the state habeas court found that petitioner had not properly preserved his claims for review, but alternatively decided that each claim failed on the merits. The state appellate court denied relief without written order. The Fifth Circuit held that federal review was barred by procedural default. 873 F.2d at 838.[11] In McCoy v. Lynaugh, 874 F.2d 954 (5th Cir. 1989), and Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989), the Fifth Circuit further developed its skewed view of Harris. In McCoy, the court acknowledged

10.(...continued)
Eleventh Circuit was wrong to presume from this rule that the denial of relief was based on procedural grounds. The Florida court might simply have evaluated the merits and decided that the record showed conclusively that petitioner was not entitled to relief.

11. The Ninth Circuit has expressly declined to follow Ellis v. Lynaugh, suggesting that a "denial of relief without written order" cannot constitute a plain statement under Harris v. Reed. Nunnemaker v. Ylst, 896 F.2d 1200, 1204 n.5 (9th Cir. 1990). See note 9, supra.

that although the petitioner had challenged the exclusion of several prospective veniremen in his state habeas petition, the state habeas courts had not addressed the issue. 874 F.2d at 954. Conceding that a literal reading of Harris would not permit a finding of procedural default, the Fifth Circuit nonetheless found the issue procedurally barred. The court based its decision not on the decision of the habeas court, the last state court rendering judgment in the case, but rather on the decision on direct appeal, where the issue had been found untimely. Id.; cf. id. at 967-68 (Williams, J., specially concurring) (no procedural bar because no clear statement by the state habeas court).

In Russell v. Lynaugh, the Fifth Circuit took its construction one step further. It held petitioner's challenge to the exclusion of a venire member defaulted, relying once again on the state court's opinion on direct appeal rather than on the habeas court's judgment. 892 F.2d at 1208-11. Reliance on the decision on direct appeal was particularly unwarranted because the challenge to that particular juror's exclusion had not been made on direct appeal -- it was not raised until state habeas, at

which time relief was denied without opinion.[12] While the majority's opinion in Russell paid lip service to the dictates of Harris v. Reed, Judge Johnson, in a stinging dissent, noted that the majority had "effectively ignore[d]" Harris and that its approach intruded into the province of the state courts, unduly burdened federal courts and threatened the uniform development and application of federal law. Id. at 1217.

The Sixth and Ninth Circuits have squarely rejected the "extrinsic evidence" approach adopted by the Fourth, Fifth and Eleventh Circuits. They have construed Harris v. Reed to require federal review of the merits in the absence of a clear and express statement by the last state court rendering judgment in the case that its decision is based on procedural default. See, e.g., Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989); Nunnemaker v. Ylst, 896 F.2d 1200 (9th Cir. 1990) (expressly declining to follow the Fifth Circuit's decision in Ellis v. Lynaugh); Durosko v. Lewis, 882 F.2d 357 (9th Cir. 1989),

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12. The opening paragraph of the Fifth Circuit's opinion in Russell perhaps sheds some light on that court's unwillingness to apply the plain statement rule correctly: "As is usually true in most of these death penalty cases, Russell's innocence is not even remotely suggested. As is also true in most of these cases, the wheels of justice have moved very, very slowly over more than a decade." 892 F.2d at 1206-07.

cert. denied, 110 S. Ct. 1930 (1990). Both the Seventh and the Second Circuits have also made clear their unwillingness to analyze state law to decide whether a procedural default bars federal review. See Rogers-Bey v. Lane, 896 F.2d 279 (7th Cir. 1990) (rejecting Seventh Circuit's pre-Harris approach which allowed federal courts to ignore the "literal language" of state court opinions when making procedural default determination); Peterson v. Scully, 896 F.2d 661, 663 (2d Cir. 1990) (rejecting argument that it should find claim procedurally barred because a holding that the state court reached the merits "would amount to a declaration that the court . . . committed an error of elementary state law"); Lopez v. Scully, 716 F. Supp. 736 (E.D.N.Y. 1989) (where motion for post-conviction relief denied without opinion, no procedural bar).

Indeed, in Hill v. McMackin the Sixth Circuit considered a factual situation and order similar to that of the Virginia Supreme Court in this case and reached a conclusion directly opposed to that of the Fourth Circuit. It concluded that the ambiguity of the state court order denying leave to file a late appeal precluded a finding of procedural default barring federal review of petition-

er's claims.[13] The Sixth Circuit rejected the analysis of the district court, which had been "persuaded by the government's argument that the absence in the court's order of customary language indicating that the court was relying on substantive grounds to deny leave to appeal effectively rendered the order one based substantially on procedural grounds." 893 F.2d at 813. Rather, the Sixth Circuit concluded that the ambiguous state order had to be treated as a decision on the merits rather than on procedural default grounds. It proceeded to consider Hill's claims on the merits. Id. at 814; see also Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990) (state court ruling that "other assertions of error are either without merit or not preserved for appellate review" does not bar federal review), petition for cert. filed, (No. 89-7262) (Apr. 17, 1990).

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13. The state court order in McMackin read as follows:

> This case is pending before the Court on the filing of a motion for leave to appeal from the Court of Appeals for Columbiana County and as an appeal of right from same said Court. Upon consideration of appellant's motion for leave to file delayed appeal,
>
> IT IS ORDERED by the Court that said motion be, and the same is hereby denied.

893 F.2d at 813.

Similarly, in both Durosko v. Lewis, 882 F.2d 357 (9th Cir. 1989), cert. denied, 110 S.Ct. 1930 (1990), and Nunnemaker v. Ylst, 896 F.2d 1200 (9th Cir. 1990), the Ninth Circuit steadfastly refused to look behind the face of the order of the last state court rendering judgment in a case, even when that court merely denied relief without opinion. In Nunnemaker, the Ninth Circuit specifically declined to follow the Fifth Circuit's contrary conclusion in Ellis v. Lynaugh. The rule of construction developed by both the Sixth and the Ninth Circuits is in direct conflict with that of the Fourth, Fifth and Eleventh Circuits.[14]

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14. The lower federal courts are also confused as to how to identify the last state court "rendering judgment." Compare Arce v. Smith, 889 F.2d 1271 (2d Cir. 1989) (applying plain statement rule to post-conviction trial court's opinion and ignoring decision of appellate court denying leave to appeal) with Hill v. McMackin, 893 F.2d 810 (6th Cir. 1989) (applying plain statement rule to denial of motion to file late appeal); see also Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990). The Court should resolve this issue by holding that the plain statement rule should be applied to the last state court that must render a decision in order to exhaust state remedies. This will entail an evaluation of state law, but federal courts must always evaluate state law to determine when remedies are exhausted. See Harris, 109 S. Ct. at 1046 (O'Connor, J., concurring). Once remedies are exhausted, a subsequent procedural default is irrelevant. Coleman was not required to appeal the state habeas denial to the Virginia Supreme Court to exhaust his remedies, because that court's consistent refusal to hear discretionary
(continued...)

B. Because The Lower Federal Courts Are Regularly Confronted With The Important Task Of Deciding Whether Review Of A Federal Claim Is Barred By State Procedural Default, This Court Should Clarify The Proper Construction Of *Harris v. Reed.*

Federal habeas courts have a responsibility to release state prisoners detained in derogation of their federal constitutional and statutory rights. See, e.g., Johnson v. Avery, 393 U.S. 483, 485 (1969) ("This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . [and] has steadfastly insisted that 'there is no higher duly then to maintain it unimpaired.'") (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)). However, in deference to state judicial processes, the federal courts have developed a principle of comity that, with narrow exceptions, provides that they will not consider claims that state courts have refused to consider on procedural default grounds. This doctrine prevents state prisoners from bypassing state courts in favor of the federal system.

14.(...continued)
appeals of denials of habeas relief renders such appeals futile. The Fourth Circuit should therefore have looked to the state habeas trial court opinion to determine whether Coleman defaulted on his federal claims. Because that court reached the merits of most of Coleman's federal claims, the federal courts should also reach the merits.

However, where a state court's denial of relief is premised not on procedural default, but rather reflects the state court's determination of the merits of a petitioner's federal claims, federal court deference to a perceived default serves no legitimate purpose. Indeed, where the state court did not rely on default, federal court deference abrogates the federal court's responsibility to determine whether such prisoners are detained -- or face execution -- in derogation of their federal constitutional and statutory rights.

By putting the onus on the state court to state "clearly and expressly" that its decision is based on procedural default, Harris furthers three goals: (1) it protects federal courts from the burden of evaluating the record and analyzing state law to determine whether a state procedural bar might underlie the state court's decision and allows them to quickly determine what federal issues are presented for review; (2) it prevents federal courts from unduly intruding into the province of the state courts; and (3) it prevents state prisoners from being wrongly deprived of federal review of their constitutional claims. See, e.g., Harris v. Reed, 109 S. Ct. at 1044; Michigan v. Long, 463 U.S. 1032, 1040-42 (1983); Russell v. Lynaugh, 892 F.2d at 1218-19 (Johnson, J., dis-

senting). State courts are entitled to rely on Harris. Where state court opinions do not state that they are based solely on state procedural grounds, it should be presumed that they are not. A federal court should not second guess the state court by engaging in its own analysis of state law.

The importance of a resolution of the conflict regarding the proper construction of Harris v. Reed is evidenced by the flood of opinions construing and applying this Court's decision. Harris issues confront the federal courts on an almost daily basis. In the 15 months since the decision was issued, it has been cited in more than one hundred reported decisions. The raft of opinions construing Harris and the direct conflict between circuits that believe federal courts may go beyond the face of the opinion to analyze state law and the state court record and those that interpret Harris v. Reed more rigorously, holding that federal review is not barred unless the state court has stated "clearly and expressly" that its decision is based on procedural default, make it necessary for this Court to intervene and clearly set forth the proper standard.

Failure to intervene at this time will undercut one of the fundamental goals of the plain statement rule:

the promotion of uniformity in federal law. See Michigan v. Long, 463 U.S. at 1040 ("there is an important need for uniformity in federal law, and . . . this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion"). The need for uniformity is nowhere more important than in capital cases. If prisoners incarcerated in states within some circuits are able to get federal review of federal claims on different terms from those incarcerated in other circuits, the consistency crucial to the constitutional imposition of capital punishment will be lost. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all").

This case is an appropriate vehicle for resolution of the circuit court conflict regarding the proper construction of Harris v. Reed. Roger Coleman has been sentenced to death. In a state court order that is anything but "clear and express," the Virginia Supreme Court denied the relief he requested. Because the Fourth Circuit went beyond the ambiguous decision to find that Coleman's state habeas counsel had filed a notice of appeal one day late, and because the federal court's

analysis of state law convinced it that the Virginia court was likely to have based its decision on procedural default, Coleman has been denied federal habeas review of his claims.

Certiorari should be granted in this case to clarify that federal habeas courts should leave analysis of state procedural default to the state courts. A federal court's determination that a claim is barred by procedural default must be based on the last state court decision itself, not on consideration of extrinsic facts from the record or on an independent federal court analysis of state law. Where the decision of the last state court rendering judgment in the case does not "clearly and expressly" rely on procedural default, federal review is not barred and is therefore mandated. Any other rule unduly burdens the federal courts and allows them to invade the province of the state courts to make determinations of state law. Moreover, it fails to provide state prisoners with the full benefits of the federal law safeguards to which they are entitled.

III.

THE COURT SHOULD DETERMINE THAT INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL MAY CONSTITUTE "CAUSE" FOR WAIVING A PROCEDURAL DEFAULT.

Roger Coleman lost his habeas appeal to the Virginia Supreme Court because counsel filed the notice of appeal one day late. As a result of this error, virtually all of Coleman's federal claims were procedurally defaulted. The Fourth Circuit declined to waive the procedural default resulting from counsel's ineffective performance because Coleman had no constitutional right to counsel on post-conviction review.

This decision was based on the Fourth Circuit's interpretation of Murray v. Carrier, 477 U.S. 478 (1986), to limit the use of deficient attorney performance as "cause" to the circumstances in which there is a constitutional right to counsel. In so holding, the Fourth Circuit joined a number of federal courts that have allowed attorney ineffectiveness to bar federal review of federal claims. Other courts have interpreted Murray v. Carrier, more broadly, holding that if attorney conduct is deficient under the performance standard enumerated in Strickland v. Washington, 466 U.S. 668 (1984), it will constitute cause whether or not the petitioner had a constitutional right to counsel at the time the default

occurred. The latter approach is preferable because otherwise, prisoners will routinely be denied access to the federal courts for vindication of their federal claims through no fault of their own.

At the very least the Court should find cause whenever ineffective assistance of post-conviction counsel prevents the assertion of any claim that can be raised only on post-conviction review. Under Virginia law, certain constitutional claims, including assertions of Sixth Amendment ineffective assistance of counsel, can be raised only on collateral review. Where a state restricts a petitioner's ability to raise a constitutional claim to post-conviction proceedings, ineffective assistance of counsel in those proceedings must constitute cause.

A. Post-Conviction Review Is Critical For The Assertion Of Certain Federal Rights.

Post-conviction review is critical to the effective presentation of constitutional claims. "[C]ollateral review will frequently be the only means through which an accused can effectuate the right to counsel." Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (holding petitioner's Sixth Amendment claim related to failure of counsel to assert Fourth Amendment argument not barred by Stone v. Powell, 428 U.S. 465 (1976)). Denying petitioner the

right to litigate his ineffectiveness claims in federal habeas proceedings would "severely interfere with the protection of the constitutional right asserted by the habeas petitioner." Kimmelman, 477 U.S. at 378; see also Murray v. Giarratano, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting) (noting need for counsel on habeas because "some claims [including ineffectiveness of counsel] ordinarily heard on direct review will be relegated to post-conviction proceedings").

The need to waive defaults resulting from the ineffectiveness of post-conviction counsel is even more pronounced for Virginia petitioners who have defaulted on Sixth Amendment ineffectiveness of counsel claims. Under Virginia law, a Sixth Amendment claim of ineffective assistance of counsel cannot be raised during the direct appeal of a conviction. See Walker v. Mitchell, 299 S.E.2d 698, 699 (Va. 1983).[15] A prisoner in Virginia is thus precluded from asserting one of the most significant constitutional claims in a proceeding at which he has a

15. Prior to July 1, 1985, no claim of ineffectiveness of counsel could be raised on direct review in Virgina. See Dowell v. Commonwealth, 351 S.E.2d 915, 919 (Va. App. 1987) (citing Walker v. Mitchell). Since then, the only ineffectiveness claim that can be raised on direct review is one in which "all matters relating to such issue are fully contained within the record of the trial." Va. Code § 19.2-317.1.

constitutional right to counsel. He is left with the inadequate forum of a post-conviction review without a guarantee of effective counsel. The four dissenters in Murray v. Giarratano recognized the special problem Virginia creates by limiting litigation of an ineffectiveness claim to collateral review. 109 S. Ct. 2765, 2778-79 (1989) (Stevens, J., dissenting). They accordingly believed that inmates on death row should have counsel for their post-conviction proceedings.

The Court has held that there is no constitutional right to counsel in post-conviction proceedings, and petitioner does not seek to relitigate that issue. However, the question of whether an attorney's fundamental mistakes that preclude state review should also preclude federal review of a petitioner's claims is very different from the one decided in Pennsylvania v. Finley, 481 U.S. 551 (1987), and Murray v. Giarratano. A determination that something constitutes cause simply means that the federal courts will hear federal claims, while a finding that a constitutional right exists creates independent rights and remedies. As Francis v. Henderson, 425 U.S. 536, 538-39 (1976), made clear, state procedural defaults do not deprive federal courts of jurisdiction. Rather, federal courts enforce state procedural defaults as a

matter of comity. The interest in comity can be outweighed by the need to vindicate important constitutional rights. A state procedural default caused by a post-conviction attorney's egregious misconduct -- misconduct that would constitute ineffective assistance of counsel if the petitioner had the right to counsel -- should not preclude all federal review but rather should constitute cause for waiving a procedural default.

B. The Federal Courts Are Divided As To Whether Ineffectiveness Of Post-Conviction Counsel Can Constitute Cause.

The representation Coleman received in his state post-conviction proceedings was objectively deficient in that his counsel failed to file a timely appeal from the denial of his state habeas corpus petition. As a result of this failure to file a timely appeal, Coleman was precluded from doing that which he always intended to do: effectively pursue his federal claims all the way through the Virginia court system. The Fourth Circuit declined to waive the procedural default that resulted from this deficient representation because it believed that Murray v. Carrier allows attorney ineffectiveness to constitute cause only when the deficient performance occurs at a time that petitioner has a constitutional right to counsel. Appendix at a14, 895 F.2d at 144. Accordingly, the court

did not reach the merits of any of Coleman's federal claims.

The other federal courts that have refused to waive procedural defaults caused by the ineffectiveness of post-conviction counsel have also based their refusal on an unnecessarily narrow reading of Murray v. Carrier. These courts have construed Murray as meaning that the only time attorney error can constitute cause is when the petitioner had a constitutional right to counsel at the time the error was committed. See Toles v. Jones, 888 F.2d 95 (11th Cir. 1989) (petitioner had no right to coram nobis counsel so there cannot be cause due to coram nobis counsel's ineffectiveness); Buelow v. Dickey, 847 F.2d 420 (7th Cir. 1988) (no waiver of a procedural default based upon ineffectiveness of discretionary appellate counsel), cert. denied, 109 S. Ct. 1168 (1989); Whitten v. Allen, 727 F. Supp. 28 (D. Me. 1989) ("[p]etitioner must bear the risk of attorney error resulting in his procedural default"); Ortiz v. O'Leary, No. 88 C 9493, 1989 U.S. Dist. Lexis 4659 (N.D. Ill. Apr. 24, 1989).

Other federal courts have not read Murray v. Carrier so narrowly. Instead, these courts have recognized the distinction between the ability to raise ineffectiveness of counsel as a separate claim and the use of

ineffectiveness as "cause" to justify the waiver of a procedural default. In Harper v. Nix, 867 F.2d 455 (8th Cir.), cert. denied, 109 S. Ct. 3194 (1989), for example, the Eighth Circuit analyzed counsel's performance on post-conviction review to determine if it was sufficiently deficient to constitute cause. See Shook v. Clarke, 894 F.2d 1496, 1497 (8th Cir. 1990) ("Ineffective assistance of counsel during post-conviction proceedings 'can constitute cause under Wainwright thus avoiding the procedural bar.'" (quoting Shaddy v. Clarke, 890 F.2d 1016, 1018 n.4 (8th Cir. 1989))); Thomas v. Armontrout, No. 85-0096-CV-W-8-P, 1989 U.S. Dist. Lexis 1530 (W.D. Mo. Feb. 8, 1989) (evaluating whether post-conviction counsel's performance constituted cause); Bolder v. Armontrout, 713 F. Supp. 1558, 1564 (W.D. Mo. 1989) (finding cause through post-conviction counsel's ineffectiveness).

In Madyun v. Young, 852 F.2d 1029, 1033 n.3 (7th Cir. 1988), the Seventh Circuit construed Murray v. Carrier as holding only that the behavioral aspect of an ineffective assistance of counsel claim, i.e., whether performance was deficient, applied. The Madyun court did not find it necessary for there to be a separate constitutional violation prior to using attorney ineffectiveness as cause to waive the default:

> [t]he crucial determination in deciding whether counsel's failures provide cause for a default is not at what stage in the proceedings those failures occurred, but rather how seriously deficient was counsel's performance.

Madyun, 852 F.2d at 1033 n.2. The Madyun court noted that there is a distinction be-tween when attorney ineffectiveness can be cause and when it can be a separate basis for relief. Id.[16]

The Court should affirm the view taken by the courts that focus on the performance of counsel, without regard to whether there is a constitutional right to counsel. It is one thing to hold that there is no constitutional right to counsel for post-conviction proceedings; it is quite another to preclude any real review of a petitioner's federal claims in federal court proceedings because his post-conviction counsel acted negligently. This Court should find that certain attorney errors on

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16. Another Seventh Circuit panel has suggested that because post-conviction counsel's performance could constitute an external impediment to the assertion of federal claims, it should suffice to waive procedural default. In Morrison v. Duckworth, 898 F.2d 1298 (7th Cir. 1990), the court stated that deficient performance by post-conviction counsel would not constitute cause under the "ineffective assistance of counsel" rubric because there is no right to counsel in post-conviction proceedings." However, the Morrison court believed that post-conviction ineffectiveness logically fit into the more general "external impediment" justification for cause.

collateral review, like the error in Coleman's case, constitute "cause" to waive the procedural default.

C. The Virginia Rule That Limits Ineffective Assistance Of Counsel Claims To Collateral Review Creates An External Impediment That Should Constitute Cause.

As the Murray v. Giarratano dissenters recognized, the strict limitation placed on ineffectiveness claims that can be raised on direct review makes it troubling that there is no right to counsel on collateral review. 109 S. Ct. at 2778-79. The Virginia rule for raising an ineffectiveness claim makes it likely that petitioners will consistently be denied the right to litigate their Sixth Amendment claims in federal court. The comity concerns that led to the creation of the procedural default doctrine are not served when the state has erected such a barrier to the full assertion of federal rights. See, e.g., Alcorn v. Smith, 781 F.2d 58, 63 (6th Cir. 1986) ("An inadequate state forum for presenting sufficiency of the evidence claims will constitute 'cause' for the procedural default."); Jurek v. Estelle, 593 F.2d 672, 684 (5th Cir. 1979), vacated on other grounds 623 F.2d 929 (1980) (en banc), cert. denied, 450 U.S. 1001 (1981) (cause where the state forum is "insufficiently hospitable to the federal claim"); see also Morrison v. Duckworth,

898 F.2d 1298 (7th Cir. 1990). The Court should at least make sure that petitioners do not lose their ability to raise federal claims in federal court based upon the ineffectiveness of counsel in the first state forum in which the federal claim can be raised. Instead, defaults of such claims resulting from counsel's ineffectiveness should be waived.

IV.

THE COURT SHOULD DETERMINE THAT THE *FAY v. NOIA* "DELIBERATE BYPASS" STANDARD REMAINS THE RULE FOR WAIVING DEFAULTS RESULTING FROM A FAILURE TO APPEAL AT ALL.

The Fourth Circuit applied the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977), rather than the "deliberate bypass" test of Fay v. Noia, 372 U.S. 391 (1963), to determine whether the procedural default resulting from petitioner's late-filed appeal should be waived. Coleman, Appendix at a13-14, 895 F.2d at 143. In so doing, the Court of Appeals decided what this Court declined to decide in Murray v. Carrier: whether the deliberate bypass standard continues to apply to failures to appeal at all.[17]

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17. The Fourth Circuit found that, because Coleman intended to appeal but simply failed to do so in a timely manner, the Fay decision did not apply. Appendix at a13-14, 895 F.2d at 143-44. Yet, the (continued...)

In Murray v. Carrier this Court "express[ed] no opinion as to whether counsel's decision not to take an appeal at all might require treatment" under the cause and prejudice standard. 477 U.S. at 492. In light of the Fourth Circuit's ruling and the rulings made by other circuits on this issue, the Court should grant certiorari to reaffirm that deliberate bypass is the proper standard to apply to a failure to appeal at all. Deliberate bypass should be the standard for failures to appeal. The decision not to take an appeal is so fundamental that it should not result in a procedural default of an individual's federal claims absent a knowing and intelligent waiver by that individual. See Sykes, 433 U.S. at 92, (Burger, C.J., concurring).

The lower federal courts have split on the issue of the proper waiver standard to apply to failures to appeal at all. Courts in the First, Eighth, Tenth, and

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17.(...continued)
purpose behind the deliberate bypass standard is to determine whether a failure to appeal was knowing and intentional. Under the Fourth Circuit's view, the deliberate bypass standard would apply only if a petitioner in fact deliberately bypassed the state courts. By creating this specious distinction, the Fourth Circuit did not address the continued viability of its holding in Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977), that a failure to appeal should continue to be judged under the deliberate bypass standard.

Eleventh Circuits have applied the deliberate bypass standard to failures to appeal, even after Wainwright v. Sykes. See Presnell v. Kemp, 835 F.2d 1567, 1577 (11th Cir.) ("We have suggested that Fay's deliberate bypass test still applies to claims involving fundamental decisions that should not, or realistically cannot be, delegated to counsel, such as the defendant's decision to plead guilty, waive his right to a jury trial, or take an appeal.") (emphasis added), cert. denied, 109 S. Ct. 882 (1989); Worthen v. Meachum, 842 F.2d 1179 (10th Cir. 1988) (reversing use of cause and prejudice to determine whether a procedural default resulting from a failure to appeal can be waived); Ashby v. Wyrick, 693 F.2d 789 (8th Cir. 1982) (evidentiary hearing required to determine if petitioner had established claim of no deliberate bypass in failure to appeal); Power v. Johnson, 678 F. Supp. 1195 (E.D.N.C. 1988) (refusing to apply cause and prejudice test when counsel misinformed client about availability of review); Dionne v. Tierney, 667 F. Supp. 36 (D. Me. 1987) (applying Fay to late-filed appeal in post-conviction proceeding); see also Forman v. Smith, 633 F.2d 634, 640 & n.8 (2d Cir. 1980) (deliberate bypass may be appropriate standard where "the procedural default eliminates an entire stage of court proceedings, while Sykes applies to

procedural defaults that abandon only a specific claim"), cert. denied, 450 U.S. 1001 (1981).

By contrast, other circuits have applied the cause and prejudice test to failures to appeal at all. See, e.g., Ewing v. McMackin, 799 F.2d 1143, 1150-51 (6th Cir. 1986); Hughes v. Idaho State Board of Corrections, 800 F.2d 905 (9th Cir. 1986) (failure to appeal on collateral review judged under cause and prejudice test); Clark v. Texas, 788 F.2d 309 (5th Cir. 1986) (cause and prejudice applied to failure to appeal on direct review).

An analysis of the interests involved demonstrates that deliberate bypass remains appropriate for analyzing the effect of a petitioner's failure to take an appeal is the correct approach. See, e.g., Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1223-24 (1986). As Chief Justice Burger explained in his concurring opinion in Sykes, the deliberate bypass standard is inappropriate for decisions made at trial, which of necessity must be entrusted to counsel and are often made without consultation with the client. Wainwright v. Sykes, 433 U.S. at 92-94 (Burger, C.J., concurring.) However, where "important rights h[a]ng in the balance of the defendant's own decision, . . . a waiver

impairing such rights must be a knowing and intelligent decision by the defendant himself." Id. at 92.

The fact that Coleman's late-filed appeal was on collateral review does not affect the analysis. In Murray v. Carrier, the Court held that the same procedural default rules should apply whether the default occurs at trial, on appeal, or during collateral review. 477 U.S. at 491. In addition, "habeas corpus . . . actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." Bounds v. Smith, 430 U.S. 817, 827 (1977) (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969)). Thus the decision not to appeal a habeas judgment is a fundamental choice that only the petitioner himself can make. The Eighth Circuit has properly applied the Fay standard to failures to take a collateral appeal. White Hawk v. Solem, 693 F.2d 825, 826 n.2 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983).[18]

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18. Those circuits that apply different procedural default rules for direct and collateral proceedings have failed to recognize both the fundamental importance of habeas appeals and this Court's statement in Murray that the same procedural default rules should apply at all stages of the proceedings, including collateral review. See, e.g., Alexander v. Dugger, 841 F.2d 371 (11th Cir. 1988) (applying cause and prejudice to failure to appeal collateral review even though Presnell v. Kemp applied Fay for failure to appeal on direct).

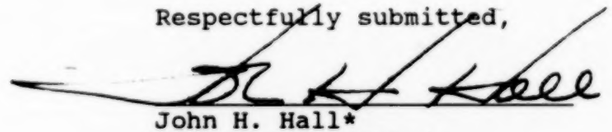
Since 1977, when Wainwright v. Sykes was decided, this Court has left open the issue of Fay v. Noia's continued viability to failures to appeal at all. Sykes, 433 U.S. at 88 n.12. The circuit courts have failed to reach a consensus as to whether the Fay v. Noia decision remains good law. Petitioner's case squarely presents the issue of which waiver standard should apply to a failure to appeal. The fundamental nature of the decision to pursue an appeal should not be lost absent a knowing decision to waive the appeal. Coleman made no such decision. He should not lose the right to have a federal court review his federal claims.

CONCLUSION

For the foregoing reasons, Petitioner Roger Keith Coleman respectfully requests that his petition for a writ of certiorari be granted to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
May 29, 1990

Respectfully submitted,



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Affidavit of Service

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DANIEL JOEL GOLDSTEIN, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am associated with the law firm of Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022.

2. I caused a copy of the annexed Petition For A Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit in the case captioned Roger Keith Coleman, Petitioner v. Charles E. Thompson, Warden, Mecklenburg Correctional Center of the Commonwealth of Virginia, Respondent to be served by first-class mail, postage pre-paid, on Donald R. Curry, Esq., Attorney for Respondent, 101 No. Eighth Street, Richmond, Virginia 23219 (telephone: (804) 786-2071) on the 29th day of May, 1990.

3. I declare under penalty of perjury that the foregoing is true and correct.

Daniel J. Goldstein

Sworn to before me this
29th day of May, 1990

Notary Public

THELMA GARVIN
Notary Public, State of New York
No. 03-4706714
Qualified in Bronx County
Commission Expires May 31, 1992

4. For the foregoing reasons, the motion for leave to proceed in forma pauperis should be granted.

Dated: New York, New York
May 29, 1990

Respectfully submitted,

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Attorneys for Petitioner
Roger Keith Coleman

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES THOMPSON, WARDEN,
MECKLENBURGCORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA

Respondent.

APPENDIX

APPENDIX A

Relevant Statutory Provisions

Code of Virginia

§ 17-110.1. Review of death sentence.

A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall, within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death;

2. Commute the sentence of death to imprisonment for life; or

3. Remand to the trial court for a new sentencing proceeding.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument. (1977, c. 492; 1983, c. 519.)

§ 19.2-264.2. Conditions for imposition of death sentence.

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

§ 19.2-264.3. Procedure for trial by jury.

A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lessor punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

§ 19.264.4. Sentence proceeding.

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

1. "We, the jury, on the issue joined, having found the defendant guilty of (here set our statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed . . . foreman" or

2. "We, the jury, on the issue joined, having found the defendant guilty of (here set our statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed . . . foreman" or

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

PUBLISHED

FILED

JAN 31 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-4002

ROGER K. COLEMAN

Petitioner - Appellant

v.

CHARLES THOMPSON, Warden

Respondent - Appellee

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Glen M. Williams, Senior District Judge. (CA-88-125-A)

Argued: October 2, 1989 Decided: January 31, 1990

Before CHAPMAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Daniel Joel Goldstein (John H. Hall; Marianne Consentino, DEBEVOISE & PLIMPTON, on brief) for Appellant. Donald Richard Curry, Senior Assistant Attorney General (Mary Sue Terry, Attorney General, on brief) for Appellee.

BUTZNER, Senior Circuit Judge:

Roger Keith Coleman, a Virginia prisoner sentenced to death, appeals the district court's denial of his petition for a writ of habeas corpus. The district court concluded that Coleman's claims were procedurally defaulted. We affirm.

Coleman was convicted on March 18, 1982, in the Circuit Court of Buchanan County, Virginia, of rape and capital murder. The opinion affirming his conviction recounts the facts about the crime and the evidence introduced for the imposition of a death sentence. See Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), cert. denied, 465 U.S. 1109 (1984). Coleman then applied for a writ of habeas corpus in the Circuit Court of Buchanan County. After an evidentiary hearing, the court denied the writ. The Supreme Court granted the state's motion to dismiss Coleman's appeal. Again, the Supreme Court denied certiorari. Coleman v. Bass, 484 U.S. 918 (1987). Coleman next petitioned for a writ of habeas corpus in the federal district court, setting forth 11 claims asserting the invalidity of his conviction and sentence. The district court denied relief without an evidentiary hearing, and this appeal followed.

I

In his brief, Coleman states the first issue on appeal as follows:

> Did the District Court err in finding that federal review of Coleman's claims is barred: (a) when dismissal by the Virginia Supreme Court was based on the novel reading of an ambiguous procedural rule, (b) when Coleman's late filing of his notice of appeal did not represent a deliberate bypass of the courts, and (c) when application of procedural default rules to counsel's error in filing the appeal one day late would deny Coleman meaningful access to the courts?

The district court found that the Virginia Supreme Court had dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Consequently, the district court dismissed as procedurally defaulted the following seven claims, which were raised only in the state habeas proceeding and not on direct appeal:

> At least one member of the jury, George Marrs, failed to disclose his preconceived opinion of Coleman's guilt.
>
> Coleman was not afforded reasonably effective assistance of counsel.
>
> Jurors were improperly excluded because of their opposition to imposition of the death penalty.
>
> The prosecution failed to disclose exculpatory evidence.
>
> The prosecution's closing argument denied Coleman a fair trial.
>
> The jury instructions at the penalty stage were constitutionally inadequate.
>
> Virginia's capital murder statute and sentencing procedures are unconstitutional facially and as applied, under the Eighth and Fourteenth Amendments to the Constitution of the United States.

The district court premised its finding of procedural default on the Virginia Supreme Court order which dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Rule 5:9(a) of the Virginia Supreme Court provides:

> No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

The state habeas court entered its order denying a writ of habeas corpus on September 4, 1986. Coleman filed his notice of appeal on October 7, 1986, one day late, counting from September 5 and omitting Saturday and Sunday, October 4 and 5. Va. Code Ann. §§ 1-13.3 and 1-13.3:1 (1987). Two weeks later Coleman moved the state habeas court to correct the date of final judgment from September 4 to the date the clerk recorded the order in the common law order book, September 9. The court denied the motion, stating in its order "final judgment was entered on September 4, 1986."

On December 4, 1986, Coleman filed a petition for appeal in the Virginia Supreme Court. The state responded by moving to dismiss the petition on the sole ground that Coleman had filed his notice of appeal more than 30 days after the entry of final judgment. Both sides then briefed the motion and the merits of the petition. The Supreme Court ruled: "[T]he motion to dismiss is granted and the petition for appeal is dismissed."

A state habeas petitioner who fails to meet the requirements of state procedural law, and who has his petition dismissed on that

basis by the last state court to review it, loses federal review of the federal claims raised in the state petition in the absence of cause and prejudice or a fundamental miscarriage of justice. Wainwright v. Sykes, 433 U.S. 72 (1977); Murray v. Carrier, 477 U.S. 478 (1986). Procedural default can be invoked by the state only when "the state court's opinion contains a 'plain statement that [its] decision rests upon adequate and independent state grounds.'" Harris v. Reed, 109 S. Ct. 1038, 1042 (1989) (quoting Michigan v. Long, 463 U.S. 1032, 1042 (1983)).

Coleman argues that the Virginia Supreme Court did not clearly and expressly rely on a state procedural rule in dismissing his petition for appeal. He points to the Court's recital that among other papers it considered the briefs that had been filed in opposition to the petition.

Coleman's argument lacks a factual basis. The Supreme Court complied with the "plain statement" rule that Harris made applicable to habeas corpus proceedings. The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal. The Court recites that it considered all of the papers filed by the parties. The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.[1]

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[1]The order states:

> On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.
>
> Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition

The district court properly concluded that the failure to comply with Rule 5:9(a) was an adequate ground to apply the bar of procedural default. The rule is mandatory. Vaughan v. Vaughan, 215 Va. 328, 210 S.E.2d 140 (1974). The mandatory nature of the rule does not make it unconstitutional. Dismissal of an application for discretionary review because it is untimely does not deprive the applicant of due process of law. Wainwright v. Torna, 455 U.S. 586, 588 n.4 (1982). Even in a capital case, procedural default justifies a federal habeas court's refusal to address the merits of the defaulted claims. Smith v. Murray, 477 U.S. 527 (1986).

B

Coleman asserts that the district court erred because the dismissal by the Virginia Supreme Court was based on a novel reading of an ambiguous procedural rule, namely whether an order is "entered" on the date the judge issues it or the date the clerk records it. He relies on the proposition that a procedural ground is inadequate if it fails to provide fair notice to the litigant. See, e.g., James v. Kentucky, 466 U.S. 341 (1984).

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for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

The major premise of Coleman's argument is flawed. The rule is not ambiguous. Its application by the Supreme Court was not novel. Notice to Coleman was adequate. The final order of the state habeas court contains the following notation immediately above the judge's signature: "Entered this 4th day of September 1986." Virginia case law giving effect to the judge's notation of entry is clear. In Peyton v. Ellyson, 207 Va. 423, 430-31, 150 S.E.2d 104, 110 (1966), the Court held that the final order denying a petition for writ of habeas corpus was entered on the date the judge signed the order and that the time for appeal started running from that date.

C

Coleman next argues that the rule of procedural default is inapplicable because his late filing did not represent a deliberate bypass of the courts. He relies on Fay v. Noia, 372 U.S. 391 (1963), and its progeny, Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977).

Murray v. Carrier forecloses Coleman's reliance on Fay and Ferguson by holding that whether procedural default in appellate proceedings bars federal consideration of the defaulted claims should be determined by the cause and prejudice standards of Wainwright v. Sykes, and not by the deliberate bypass standard of Fay. 477 U.S. at 485-92. See also Smith v. Murray, 477 U.S. at 533. In Murray v. Carrier, the Court noted that it expressed no opinion concerning application of the deliberate bypass standard

to decision of counsel "not to take an appeal at all." 477 U.S. at 492. But this reservation need not detain us, because Coleman's counsel decided to take an appeal.

D

A prisoner can avoid the bar of procedural default if he can show "cause for the noncompliance" with state law and "actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 433 U.S. at 84. Coleman assigns as cause his counsel's error in failing to file a timely notice of appeal from the final order of the state habeas court. The error, he asserts, is of sufficient magnitude to constitute ineffective assistance of counsel that denied him access to the courts. He relies on Murray v. Carrier, 477 U.S. at 489, where the Court discussed the circumstances which would justify treating error of counsel as cause.

Coleman's reliance on Murray v. Carrier is misplaced. There the Court was discussing error arising out of a direct appeal in which a prisoner has a right to counsel whose performance is not constitutionally ineffective. In contrast, the error in Coleman's case occurred in state habeas corpus proceedings. The difference in the proceedings is significant, for a state prisoner seeking a writ of habeas corpus does not have a constitutional right to counsel. Murray v. Giarratano, 109 S. Ct. 2765 (1989).

Wainwright v. Torna rejects a claim that is essentially similar to Coleman's. In Torna, a prisoner's counsel filed an

application for discretionary review in the state Supreme Court one day late. The prisoner charged that this error denied him effective assistance of counsel. The Supreme Court held: "Since [the prisoner] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." 455 U.S. at 587-88. Because Coleman, like Torna, had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel. Thus, he cannot show "cause" by showing ineffective assistance of counsel. But see Madyun v. Young, 852 F.2d 1029, 1033 n.2 (7th Cir. 1988) (dictum).

E

A prisoner may also avoid the bar of procedural default by demonstrating that denial of federal review will result in a fundamental miscarriage of justice. Harris v. Reed, 109 S. Ct. at 1043; Smith v. Murray, 477 U.S. at 537; Murray v. Carrier, 477 U.S. at 495. This avenue of relief, however, is limited to "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. at 496. This principle does not entitle Coleman to avoid the bar of his procedural default.

The district court found that the evidence was sufficient to show Coleman's guilt beyond a reasonable doubt. The evidence included Coleman's admission that he participated in the crimes. Hair, blood, and semen typing indicated that Coleman raped the

victim. See Coleman v. Commonwealth, 226 Va. at 52-53, 307 S.E.2d at 876. Proof of Coleman's conviction for the attempted rape of another person several years earlier and the manner in which he killed his victim in this case were aggravating factors that the jury could consider in imposing the death sentence. See 226 Va. at 53-55, 307 S.E.2d at 876-77.

In sum, we conclude that the district court did not err by ruling that the failure by Coleman's counsel to file a timely notice of appeal from the final order of the state habeas court constituted a procedural default barring federal review of the claims asserted only in the state habeas corpus proceeding.

II

The second issue raised by Coleman is as follows:

> Did the District Court err in dismissing Coleman's petition without first holding an evidentiary hearing even though material factual disputes raised in collateral review proceedings before the Commonwealth courts had not been resolved?

Coleman asserts that the state court did not resolve factual disputes pertaining to his claim that one of the jurors, George Marrs, was biased against him. He also contends disputed issues of fact remain with respect to his claim of ineffective assistance of counsel.

Neither the complaint about the juror nor the claim of ineffective assistance of counsel was raised on direct appeal. Therefore, Coleman's procedural default in failing to file a timely notice of appeal of the state court's final judgment denying his

petition for a writ of habeas corpus bars his review in federal court. Consequently, an evidentiary hearing was unnecessary.

III

The district court held that Coleman's next three issues were also barred by procedural default. Nevertheless, it alternatively considered Coleman's claims and found them to be without merit. In addition to his general denial of procedural default, Coleman assigns error to the district court's alternative disposition of his claims for lack of merit. He raises the following issues:

> Did the District Court err in finding that Coleman was not convicted by a biased jury even though evidence presented in the collateral review proceedings in the Commonwealth courts demonstrated that one of the jurors had, before trial, expressed his desire to be on the jury so he could help "burn" Coleman?
>
> Did the District Court err in finding that Coleman was effectively represented by counsel when the evidence demonstrates that the representation Coleman received, from the change of venue motion, through trial preparation and the sentencing proceeding, was grossly deficient and prejudiced Coleman?
>
> Did the District Court err in finding that the Commonwealth satisfied due process discovery requirements even though it failed to produce to Coleman evidence which supported Coleman's alibi and undermined the prosecution's theory of the case?

None of the claims mentioned in these issues was raised on direct appeal. The state habeas court found that they lacked merit, and the Virginia Supreme Court denied discretionary review because Coleman's notice of appeal was untimely.

The district court properly sustained the state's position that Coleman's procedural default barred federal review of all of these claims.

IV

Coleman asserts that the death penalty was unconstitutionally imposed for reasons that he states in the final issue that he raises on appeal:

> Did the District Court err in finding that the death penalty was constitutionally imposed on Coleman in spite of the fact that (a) the record cannot support the conclusion that the jury met the requirements of Virginia law by unanimously finding the existence of an aggravating circumstance, and (b) the jury was not provided with a constitutionally adequate limiting construction for Virginia's "outrageously or wantonly vile" aggravating circumstance?

Coleman made no objection in the trial court or on direct appeal to the errors he now assigns. As we have previously noted, Coleman did not perfect a timely appeal from the denial of his state habeas corpus petition. The state asserts, and the district court properly ruled, that federal review of Coleman's complaints about the constitutionality of the death sentence is barred by his procedural default at both the trial and habeas proceedings.

V

Quite apart from the propriety of the instructions in the penalty phase of the trial, the decision of the Virginia Supreme Court establishes that Coleman's sentence was lawful. Neither the Sixth nor Eighth Amendment requires "a jury trial on the sentencing

issue of life or death." Hildwin v. Florida, 109 S. Ct. 2055, 2056 (1989) (Sixth Amendment); Cabana v. Bullock, 474 U.S. 376, 384-88 (1986) (Eighth Amendment). State law may authorize a forum other than the jury to impose the death penalty. An appellate court is a constitutionally permissible forum. Cabana, 474 U.S. at 392.

Cabana dealt with an aggravating factor necessary for the imposition of the death penalty on one who aids and abets a felony in the course of which others commit a murder. See Cabana, 474 U.S. at 378. The Court held that, if authorized by state law, an appellate court can determine whether an aggravating factor has been proved and can impose the death penalty. The appellate court can exercise such power even when the jury may not have found an aggravating factor. 474 U.S. at 384-88. Under these circumstances a federal court should not confine its inquiry to the jury instructions. "Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made." 474 U.S. at 387. A federal court errs by "focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of [the aggravating factor] had been made by the trial court or by the state appellate court." 474 U.S. at 389. Although Cabana dealt with a specific categorical aggravating factor, the principles the Court explained are applicable to the determination of other aggravating factors in crimes committed under circumstances quite different from those

examined in Cabana. See, e.g., Johnson v. Mississippi, 108 S. Ct. 1981, 1989 (1988) (White, J., concurring). The major premise of Cabana--the Constitution does not require a jury for the imposition of the death penalty--is applicable to Coleman's case.

To apply Cabana's principles, a federal court must determine what authority state law confers on its appellate court with respect to the death penalty and then ascertain whether this authority has been constitutionally exercised. Cf. Spazino v. Florida, 468 U.S. 447, 457-65 (1984).

Virginia law confers broad powers on the Supreme Court. Va. Code Ann. § 17-110.1 (1988). Every sentence of death must be reviewed by the Court. This review may be consolidated with an appeal, if one is taken. In addition to errors "enumerated by appeal," the Court must consider other specific issues that address the fundamental fairness of the trial and sentence.[2] The statute vests in the Supreme Court extraordinary authority to commute the sentence of death to imprisonment for life. It may affirm the sentence of death or remand for new sentencing proceedings. In short, the only limitation on the Court's power is the authority to impose a death sentence when the trial court, with or without a jury, has imposed a lesser penalty.

In Coleman's case, the Virginia Supreme Court exercised the power conferred on it by § 17-110.1. It compared Coleman's case

[2]There is no counterpart to this proceeding in the federal judicial system. Federal review of constitutional issues in death cases, unfettered by procedural bars, would promote fairness and reduce the delay and complexity that all too often mark the present system.

to others "where the death sentence was based upon the dangerousness of the defendant and the vileness of the crime."[3] Coleman v. Commonwealth, 226 Va. at 54, 307 S.E.2d at 877. Justifying the application of these statutory aggravating factors, it recounted that "Coleman, who had previously been convicted of attempted rape, raped his victim, cut her throat, dragged her through her house, and stabbed her twice at or after her death." 226 Va. at 55, 307 S.E.2d at 877. The Court cited as a somewhat analogous case Smith v. Commonwealth, in which it constitutionally limited the statutory vileness factor by defining "'aggravated battery' to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). The Court stated that it had "independently determined that the sentence of death was properly imposed," and it "decline[d] to commute the sentence." 226 Va. at 55, 307 S.E.2d at 877.

[3]Va. Code Ann. § 19.2-264.4C (1983) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

We have upheld the constitutionality of the statute as narrowed by Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978). See Turner v. Bass, 753 F.2d 342, 353 (1985).

In Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988), the Court explained:

> Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

The Virginia Supreme Court's review of the sentence satisfies this constitutional requirement.

Finding no constitutional infirmity that is cognizable on federal review, we affirm the judgment of the district court denying a writ of habeas corpus.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-4002

ROGER K. COLEMAN

Petitioner - Appellant

v.

CHARLES THOMPSON, Warden

Respondent - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Chapman and Judge Merhige.

For the Court,

JOHN M. GREACEN

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

ROGER KEITH COLEMAN, :
Plaintiff :
v. :
CHARLES E. THOMPSON, Warden, :
Defendants :

CIVIL ACTION NUMBER 88-0125-A

O R D E R

In accordance with a Memorandum Opinion entered this date, the petition for habeas corpus is denied in its entirety.

Nothing further remaining to be done, this case is dismissed and stricken from the docket.

The Clerk is directed to send certified copies to counsel of record.

ENTER: This 6th day of December 1988.

Glen M. Williams
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

ROGER KEITH COLEMAN, :
Plaintiff :
v. :
CHARLES E. THOMPSON, Warden, :
Defendants :

CIVIL ACTION NUMBER 88-0125-A

MEMORANDUM OPINION

Roger Keith Coleman ("Coleman") was convicted of the rape and capital murder of Wanda McCoy in Buchanan County, Virginia. For the rape conviction, punishment was fixed at life imprisonment and on a separate hearing on the issue of punishment for the capital murder conviction, a sentence of death was imposed. The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983). A writ of certiorari was denied by the United States Supreme Court. 46 U.S. 1109 (1984). On April 26, 1984, Coleman filed a petition for a writ of habeas corpus in the Buchanan County Circuit Court. An evidentiary hearing was conducted and a letter opinion dated June 23, 1986 rejected Coleman's claims. The Order in accordance with the letter opinion was signed on September 4, 1986. Coleman filed a notice of appeal on October 7, 1986 and subsequent thereto, filed a motion to correct the date of entry of judgment in the Circuit Court. Coleman requested in the motion that the Circuit Court correct the date of final judgment from September 4, 1986 to September 9, 1986. This motion was denied and on December 3, 1986 Coleman filed a petition for appeal in the Virginia Supreme Court.

A motion to dismiss the appeal was filed on the grounds that the notice of appeal had not been filed in a timely manner. The Virginia Supreme Court granted the motion to dismiss by Order dated May 19, 1987 and subsequently denied a petition for a rehearing on June 12, 1987. On September 10, 1987, Coleman filed a petition for a writ of certiorari in the United States Supreme Court, which petition was denied on October 19, 1987. Coleman v. Bass, 108 S.Ct. 269 (1987).

Coleman now files this complaint challenging the validity of his convictions and death sentence, raising the following claims:

A. AT LEAST ONE MEMBER OF THE JURY, GEORGE MARRS, FAILED TO DISCLOSE HIS PRECONCEIVED OPINION OF COLEMAN'S GUILT.

B. COLEMAN WAS NOT AFFORDED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

C. COMMUNITY PREJUDICE SO INFECTED THE TRIAL AS TO DEPRIVE COLEMAN OF AN IMPARTIAL JURY AND DUE PROCESS OF LAW.

D. JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

E. THE PROSECUTION FAILED TO DISCLOSE EXCULPATORY EVIDENCE.

F. THE PROSECUTION"S CLOSING ARGUMENT DENIED COLEMAN A FAIR TRIAL.

G. THE JURY INSTRUCTIONS AT THE PENALTY STAGE WERE CONSTITUTIONALLY INADEQUATE.

H. THE ADMISSION OF PHOTOGRAPHS DENIED COLEMAN A FAIR TRIAL.

I. EVIDENCE OBTAINED IN VIOLATION OF MIRANDA WAS IMPROPERLY ADMITTED.

J. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT.

K. VIRGINIA'S CAPITAL MURDER STATUTE AND SENTENCING PROCEDURES ARE UNCONSTITUTIONAL FACIALLY AND AS APPLIED, UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Claims C, H, I, and J were raised by Coleman in his direct appeal from his conviction to the Supreme Court of Virginia. Claims A, B, D, E, F, G, and K were raised by Coleman in the state habeas petition and therefore, the petitioner has exhausted state remedies on all of the issues raised in this case. Defendant has filed a motion to dismiss all of Coleman's claims. The matter has been thoroughly briefed and has been orally argued and is now ripe for decision.

The defendant contends that claims A, B, D, E, F, G and K which were not raised on direct appeal, but were subsequently raised in the state habeas proceedings are barred from federal review because Coleman failed to perfect an appeal to the Supreme Court of Virginia. Rule 5:9 (a), Rules of the Supreme Court of Virginia, provides that a notice of appeal must be filed with the clerk of the trial court within thirty days after entry of final judgment. The time limit cannot be extended. Rule 5:5 (a). The Order dismissing the habeas petition was signed by the Circuit Court Judge on September 4, 1986 and so states on its face. Actually, the evidence shows that Coleman's counsel had known since June 23, 1986 the decision of the Circuit Court Judge in the letter mailed to the parties. Coleman did not file his notice of appeal until thirty-three days after entry of judgment. Coleman sought the court to change the date of the state court Order on the theory that the entry of judgment did not occur until the

Clerk of Buchanan County Circuit Court had actually filed the same.

The Supreme Court of Virginia has held that Rule 5:9 (a) is mandatory. Vaughan v. Vaughan, 215 Va. 328, 210 S.E.2d 140 (1974). Coleman, having failed to follow the required state procedural rule, has procedurally defaulted. Wainwright v. Sykes, 433 U.S. 72 (1977). Sykes applies to capital and non-capital cases. Smith v. Murray, 477 U.S. 527, 538 (1986). It is argued, however, that the blame for the procedural fault rested upon the habeas attorneys and that the petitioner has just cause not to be bound by the procedural error. The right to effective assistance of counsel is not required as a constitutional right in state habeas proceedings, Evitts v. Lucy, 469 U.S. 387 (1985). Since there is no constitutional right to counsel during state habeas proceedings, there is no constitutional right to effective assistance of counsel at that stage. Whitley v. Muncey, 823 F.2d 55 (4th Cir. 1987), cert. denied, 107 S.Ct. 3279 (1987). A state court dismissal of appeal because a notice is filed one day late does not deny due process. Wainwright v. Torna, 455 U.S. 586 (1982). This court accordingly finds that Coleman defaulted by failing to perfect his habeas appeal in the Virginia Supreme Court in a timely manner. However, in view of the gravity of this case, the court will proceed to analyze the various claims made by Coleman.

Coleman also contends that the state court, upon hearing his habeas proceeding, failed to make credibility findings on matters which were in dispute and also desires an additional evidentiary hearing to present additional evidence which was not presented in the state court. The court has reviewed the record in the state court proceedings and finds that the state Circuit Court Judge, hearing the case, did make specific evidentiary findings of credibility and to allow Coleman to present again this same matter before this court is to have this court to consider whether it would make the same credibility finding that was made by the state court. Coleman was represented by counsel, was given a fair opportunity to present any evidence that he wanted to and the court proceeded to rule on all the matters that were presented to it. Therefore, the court is of the opinion that, since there was an adequate hearing given to Coleman on the state level, it is improper to conduct another hearing in this court.

A. WAS JUROR MARRS PREJUDICED AGAINST THE DEFENDANT IN SUCH A WAY THAT HE SHOULD NOT HAVE BEEN A JUROR AND DID HE FAIL TO DISCLOSE THIS FACT ON VOIR DIRE?

At the state evidentiary hearing, Coleman presented the evidence of Texas and Opal Rash who were first cousins of a juror by the name of George Marrs. These two witnesses testified that some time prior to Coleman's trial, Marrs had expressed to them a desire to serve on Coleman's case and also expressed an opinion that Coleman was guilty. They also presented evidence that Marrs stated that he "wanted to help burn the s.o.b." George Marrs appeared and testified as a witness and categorically denied any such conversation with the Rashes and denied that he made any statements attributed to him and denied that he was prejudiced in any way at Coleman's trial.

In a letter opinion dated June 23, 1986, the state habeas court recited the Rashes' testimony and found that the

issue was one of credibility. The court then concluded that "the testimony of George Marrs was not biased and was credible." This court must presume that this finding that Marrs' testimony was credible is correct. 28 U.S.C. § 2254(d), Summer v. Mata, 455 U.S. 591, 592 (1982); Marshall v. Lonberger, 459 U.S. 422 (1983); Patton v. Yount, 467 U.S. 1025, 1036 (1984).

In conjunction with the claim that Marrs was an improper juror, Coleman also contends that he was denied the opportunity to question Marrs concerning whether or not he knew that Coleman had been convicted of a prior felony, of attempted rape, and that such knowledge was a significant factor in the jury's deliberations at the guilt stage of the trial. Nowhere in the petition for a writ of habeas corpus did Coleman allege that the jury had been improperly influenced during deliberations by knowledge of Coleman's prior record. There is nothing in the state court's decision whereby it purported to decide such a claim. Since Coleman did not raise this claim in his state petition he cannot raise it now. Whitley v. Bair, 802 F.2d 1487, 1500 (4th Cir. 1986), cert. denied, 107 S.Ct. 1618 (1987). Even if procedural default were not involved, the evidence Coleman sought to have admitted is inadmissible. The Federal Rules of Evidence provide that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith . . ." Fed. R. Ev. § 606(b). It would contravene this rule to allow Marrs to testify

to his and other jurors' states of mind during their deliberations.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Coleman advances several instances which he alleges constitute ineffective assistance of counsel. Coleman must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984).

Coleman's first allegation of ineffective assistance of counsel is that "[c]ounsel failed to provide effective assistance with respect to Coleman's motion for a change of venue based on prejudicial publicity and community prejudice . . . ." The record shows that his attorney did present five newspaper articles and the testimony of Coleman's father and also attempted to enlist the assistance of other members of Coleman's family. Therefore, there was evidence presented on behalf of Coleman in order to obtain a change of venue. Trial counsel, however, was of the opinion, based upon his experience in the county, that he could get a fair trial in Buchanan County and that under existing law, it would be necessary for them to show that he could not get a fair trial during the jury selection process. Therefore, counsel conducted an extensive voir dire which consumes more than two hundred and fifty pages of the transcript. While, in hindsight, it may appear that counsel could have done more on the change of venue, this court is of the opinion that the attorney did an excellent job of pursuing this matter and cannot be second-guessed.

Coleman contends that his counsel conducted a constitutionally ineffective voir dire concerning juror attitudes toward the death penalty and exposure to pretrial publicity. During voir dire eight jurors were excluded for cause, without objection, because they indicated they could not impose the death penalty. Coleman's counsel did not attempt to rehabilitate these witnesses. The court does not find that counsel's failure to rehabilitate constitutes ineffective assistance. Counsel knew the jurors were excludable for cause. Lockhart v. McKee, _____ U.S. ___, 106 S.Ct. 1758 (1986); Wainwright v. Witt, 469 U.S. 412 (1985). With respect to voir dire concerning exposure to pretrial publicity, the court has already noted counsel's "extensive and searching voir dire." The court concludes that Coleman was adequately assisted by counsel during jury voir dire.

Coleman also contends that during the guilt stage, preparation was inadequate. However, this court agrees with the state Circuit Judge who tried the habeas case that trial counsel did adequately investigate, prepare for and present the case at the guilt stage and that they had an excellent understanding and knowledge of the facts of the case. This court agrees with the findings of the state habeas court that counsel's cross-examinations of the prosecution's witnesses showed an excellent understanding and knowledge of the facts of the case. An expert attorney called by the plaintiff at the habeas hearing found that the cross-examination was "a good job." Coleman claims that he was prejudiced because his counsel did not personally interview Roger Matney and also contends that they failed to interview certain prosecution witnesses. Coleman did not produce any evidence

at the state habeas hearing and he has not proffered any to this point as to any witnesses that were not interviewed and the court is of the opinion that the failure to interview personally Roger Matney is speculative as to any possible prejudice.

Coleman contends that his attorneys failed to file appropriate motions. More specifically, he contends that counsel should have filed a discovery motion requesting Phillip Van Dyke's time card. The crime for which Coleman was convicted occurred at 11:00 p.m. Coleman spoke with Van Dyke from 10:25 to 10:30 p.m. on the evening in question. When Van Dyke left Coleman, he proceeded directly to work and "punched in" at 10:41 p.m. This conversation with Van Dyke constituted a link in the chain of Coleman's alibi defense. Van Dyke's time card was not introduced at trial; however, Van Dyke testified that he punched in at 10:41 p.m. and his testimony was not disputed. The court fails to see how this constitutes deficient performance on the part of defense counsel. Although the time card was not introduced there certainly was evidence introduced as to the time of the Coleman-Van Dyke conversation.

Coleman also contends that his counsel were ineffective because they failed to object to the argument presented by the prosecution. The court has reviewed the arguments submitted by the prosecution and is of the opinion that any failure to object was simply a matter of strategy on the part of counsel. Attorneys are generally reluctant to object to argument where the objection will merely highlight the objectionable information. This trial tactic does not constitute ineffective assistance of counsel.

Coleman also contends that there was inadequate preparation and presentation of evidence at the penalty stage of his trial. Upon a review of the record, the court is of the opinion that counsel properly prepared Coleman for the penalty proceeding and requested Coleman to give them the names of witnesses but Coleman did not provide any. It was the testimony of trial counsel that Coleman told them that he didn't want any witnesses and didn't want anybody at the penalty stage of the hearing. Counsel received no help from the friends and relatives of Coleman. Such witnesses as were called were witnesses that were found and deemed to be relevant by counsel and not as a result of any help that they received from Coleman or his family. Coleman also contends that improper instructions were given at the penalty stage of the hearing. The court has examined these instructions and finds that they are grounded in Virginia law. Certainly counsel cannot be deemed ineffective for failing to object when the instructions accurately state Virginia law.

Coleman also contends that he was given ineffective assistance of counsel on direct appeal. However, Coleman's attorneys raised a total of seven issues before the Virginia Supreme Court, all of which had been properly preserved for appeal and all of which were decided by the Virginia Supreme Court. The court is of the opinion that counsel proceeded properly.

C. DID THE STATE TRIAL COURT IMPROPERLY DENY COLEMAN'S MOTION FOR CHANGE OF VENUE?

Coleman contends that the state trial court improperly denied his motion for change of venue or venire. The Virginia

Supreme Court specifically found that the trial court "had no difficulty in impaneling a jury free from bias." Coleman v. Commonwealth, 226 Va. 31, 45, 307 S.E.2d 864-872 (1983). Under 28 U.S.C. § 2254(d) this court must afford a presumption of correctness to the state court finding that the jurors were fair and impartial. Wainwright v. Witt, 469 U.S. 412 (1985); Summer v. Mata, 449 U.S. 539 (1981). The record indicates that the trial court was extremely careful to assure that a fair and impartial jury was impaneled. Coleman conducted extensive individual voir dire. No juror was seated over Coleman's objection. The court concludes that the jury was fair and impartial and the trial court did not err in denying Coleman's motion for a change of venue or venire.

D. EXCLUSION OF JURORS WHO OPPOSED DEATH PENALTY

At the trial, eight jurors were excluded for cause because they opposed the death penalty. Coleman now contends that this was prejudicial error. Coleman did not raise this issue at trial or on appeal. The state habeas court determined that Coleman was barred by Virginia law from raising the claim in his state habeas petition. Slayton v. Perrigan, 215 Va. 27, 205 S.E.2d 680 (1974). The United States Supreme Court has held that "absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver " federal habeas review is barred. Wainwright v. Sykes, 433 U.S. 72, 87 (1976). Coleman has alleged no cause for his failure to raise this claim. This court, therefore, is barred from reviewing it.

E. DID THE COURT COMMIT DISCOVERY VIOLATIONS BY FAILURE TO OBTAIN EXCULPATORY EVIDENCE ON BEHALF OF COLEMAN?

Coleman alleges that the Commonwealth denied his due process rights by failing to provide Coleman with several items of exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1962). The Brady case "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 675 (1984). The Bagley case defined materiality as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

Id. at 682.

Coleman alleges the prosecution failed to disclose four items of exculpatory evidence: notes police took when interviewing Coleman's wife, Van Dyke's "time card," the crime scene report and Sandra Stiltner's statement. The court concludes these items of evidence were disclosed to Coleman. These items of evidence were in the prosecution's file. At the state habeas hearing Coleman's trial attorneys testified that they had full access to the prosecution's entire file. Therefore, the court concludes the prosecution did comply with Brady v. Maryland.

Even if the prosecution had not disclosed the material evidence, there was no due process violation. Coleman alleges that his wife told police he had arrived at home at 11:05 p.m. She had, however, also told both police and defense counsel that Coleman had arrived at home at 11:30 p.m. There is no reasonable

probability that police notes that indicated she once put 11:05 p.m. as the time of Coleman's arrival at home would have changed the outcome of the trial. As to the Van Dyke "time card," Van Dyke testified as to all of the relevant information on his time card. Disclosure of the time card would not have changed the outcome of the trial nor is it probable that the crime scene report would have changed the trial. It indicates that there was a mark made with very little pressure on the door to the victim's home. It is not probable that this would have affected the outcome of the trial given the fact that the victim's husband and the police chief testified that there was no sign of forced entry into the house. Finally, Coleman alleges that a statement made by Sandra Stiltner indicated Coleman came by her trailer between 10:00 and 10:30 on the night in question. At trial Ms. Stiltner testified Coleman could have left as late as 10:25 p.m. There is no reasonable probability, therefore, that the disclosure of Ms. Stiltner's statement would have affected the outcome of the trial.

F. IMPROPER PROSECUTORIAL ARGUMENT

The state habeas court found that all of the claims regarding prosecutorial argument were procedurally defaulted because they had not been raised at trial nor on appeal citing Slayton v. Perrigan, 215 Va. 27, 205 S.E.2d 680 (1974). This court is of the opinion that this matter has been double-defaulted in that it was not raised at trial nor was it raised on appeal and it was further procedurally defaulted in the appeal of the habeas proceedings.

G. CONSTITUTIONAL ADEQUACY OF THE PENALTY STAGE INSTRUCTIONS

The state habeas court ruled that the claim was barred from habeas by Coleman's procedural default. The court is of the opinion that this is correct and the claim was again defaulted when Coleman failed to perfect an appeal of the habeas proceeding. This court has further reviewed the instructions however in the light of James Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984) and the court finds that the penalty stage instructions at Coleman's trial satisfy the Briley standard.

H. SHOULD PHOTOGRAPHS OF THE VICTIM'S BODY FOUND AT THE SCENE OF THE CRIME HAVE BEEN ADMITTED INTO EVIDENCE?

Federal courts do not sit to review state evidentiary questions. Lisenba v. California, 314 U.S. 219 (1941). Unless there is something fundamentally unfair so as to make a constitutional issue of the same, generally this court is bound by the evidentiary findings of the state court. There is no contention that the photographs do not accurately depict what they purport to depict and such matters are and should be left to the discretion of the trial judge. The Virginia Supreme Court has found that the photographs were relevant and material under the facts of the case and this court is certainly required to give due deference to this finding by the state Supreme Court.

I. DID THE STATE COURT CORRECTLY REJECT COLEMAN'S MIRANDA CLAIM?

Coleman's argues that the trial court admitted two statements the police obtained from him in violation of Miranda.

The state habeas court found the interrogatories to be noncustodial. This finding is entitled to a presumption of correctness. The interview of Coleman took place in a police officer's vehicle parked outside Coleman's house. At the trial, the officer testified that Coleman was free to leave. Coleman was not arrested until a month after this interview. Thus this court must concur with the state habeas court that there was no custodial interrogation.

J. WAS THE EVIDENCE SUFFICIENT TO SHOW COLEMAN'S GUILT BEYOND A REASONABLE DOUBT?

Coleman argues that the evidence was insufficient to support the jury's verdict. In determining this issue, this court must view the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318 (1979). The Virginia Supreme Court in reviewing this issue followed a stricter standard. The Virginia court followed the rule that circumstantial evidence must be "sufficiently convincing to exclude any reasonable hypothesis except that of guilt." Coleman v. Commonwealth, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983). If the evidence is sufficient to meet the Virginia standard, then a fortiori it is sufficient to meet the lesser Jackson standard. Inge v. Procunier, 758 F.2d 1010, 1014 (4th Cir. 1985), cert. denied, 106 S.Ct. 104 (1985). The court finds that there was sufficient evidence to support the jury's verdict. There is a wealth of circumstantial evidence in this case in addition to evidence that Coleman admitted to Roger

Matney that he had participated in the rape-murder. Clearly, there was sufficient evidence in this case to go to the jury and there is sufficient evidence under the Jackson standard to sustain this conviction.

K. CONSTITUTIONALITY OF VIRGINIA'S DEATH PENALTY STATUTE

The state habeas court held that Coleman had procedurally defaulted with respect to his claim that Virginia's death penalty statute is unconstitutional because he failed to raise the claim at trial or on dire court appeal. See, Slayton v. Perrigan, 215 Va. 27, 205 S.E.2d 680 (1974). As noted earlier, in the absence of both cause and prejudice, federal habeas review is barred where there is a state procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977); Clanton v. Muncy, 845 F.2d 1238 (4th Cir. 1988). Coleman has alleged neither cause for his default nor prejudiced from his default; therefore, it is not appropriate for this court to review this particular claim.

CONCLUSION

The court having found on the merits that there was no denial of any constitutional rights of Coleman in his trial and the various appeals and other hearings related thereto, the court is of the opinion that this petition for habeas corpus shall be denied in its entirety and an Order will entered to that effect.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 4 day of December 1988.

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: [illegible] Deputy Clerk

Albert M. Williams
UNITED STATES DISTRICT JUDGE

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 13th day of May, 1987.

Roger Keith Coleman, Appellant,

against Record No. 861147
Circuit Court No. 119-84

Gary L. Bass, Warden, etc., Appellee.

From the Circuit Court of Buchanan County

On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 1, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: Debra A. Kinsman
Deputy Clerk